

EPM WINTER NEWSLETTER

2019





LAPSING OF DEVELOPMENT CONSENTS; AN UPDATE FROM THE NSW COURT OF APPEAL

Samantha Daly, Partner, Johnson Winter & Slaterry

Development consents typically lapse 5 years after they are granted, unless construction works relating to the land to which the consent applies are physically commenced. We are often asked by clients how much work they need to do to physically commence a development consent. Following a recent decision of the NSW Court of Appeal (CoA), the clearing of shrubs may be sufficient to prevent the lapsing of a development consent, provided the clearing does not contravene any applicable conditions of consent. This is highly significant given the minor nature of clearing works, and may allow many developers to ‘enliven’ development consents with minimal effort and cost.

The case of *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26 was determined by the CoA on 25 February 2019. The appeal related to a decision by her Honour Pain J in the Land and Environment Court. The appellant in the appeal, Cando Management and Maintenance Pty Ltd (Cando), owned land in Guildford on which it had partially constructed nine townhouses. Development consent had been granted by Parramatta City Council on 23 July 2004 for the construction of nine townhouses on the land (development consent). The development consent lapsed on 23 July 2009 unless building, engineering or construction work relating to the building, physically commenced on the land before 23 July 2009. The issues for determination before both the Land and Environment Court and the CoA were:

1. Whether construction work had physically commenced by 23 July 2009 to prevent lapsing of the development consent?
2. Whether the Court could make an order permitting Cando to complete the works (including rectification works to ensure the development was compliant with the development consent and the Building Code) without requiring a construction certificate and occupation certificate?

In relation to the first question, Cando was required to prove that the development consent had not lapsed. It was common ground between the parties that demolition had occurred on the site before 23 July 2009, but that it was not in accordance with the development consent. However the CoA held that the removal of shrubs was construction work that was separate from demolition work, the work should be distinguished from the clearing of trees (which had also been carried out in a manner that was inconsistent with the development consent) and the clearing of shrubs was consistent with the development consent. Therefore the clearing of shrubs was sufficient to physically commence the development consent. Accordingly the development consent had not lapsed. However whilst the consent had not lapsed, there had still been clear breaches of the consent by Cando.

In relation to the second question, Cando was seeking an order under section 124 (now s9.46) of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) which provides a broad discretion for the Court to

make a range of orders to remedy or restrain a breach of the EP&A Act, including carrying out rectification works. In the Cando case, the CoA held that it had no power to make the rectification orders as the orders would be in breach of the EP&A Act. The CoA ordered that Cando be restrained from continuing its erection of the development until it had obtained a construction certificate for the further building (rectification) works and appointed a principal certifying authority. Furthermore Cando was restrained from occupying the premises until an occupation certificate had been obtained.

This consent is useful in confirming that minor works, including the clearing of shrubs, may be enough to prevent a development consent from lapsing. It also limits the scope of orders that may be made by the Court to remedy a breach of the EP&A Act. This is a reminder of the importance of ensuring development consents are lawfully activated (to prevent their lapsing), and that development is carried out in accordance with development consent conditions and the EP&A Act, including the requirement to obtain a construction certificate. A failure to do so may not be able to be rectified by Court orders and may require an additional application for a new or modified development consent.



KOALA CONSERVATION

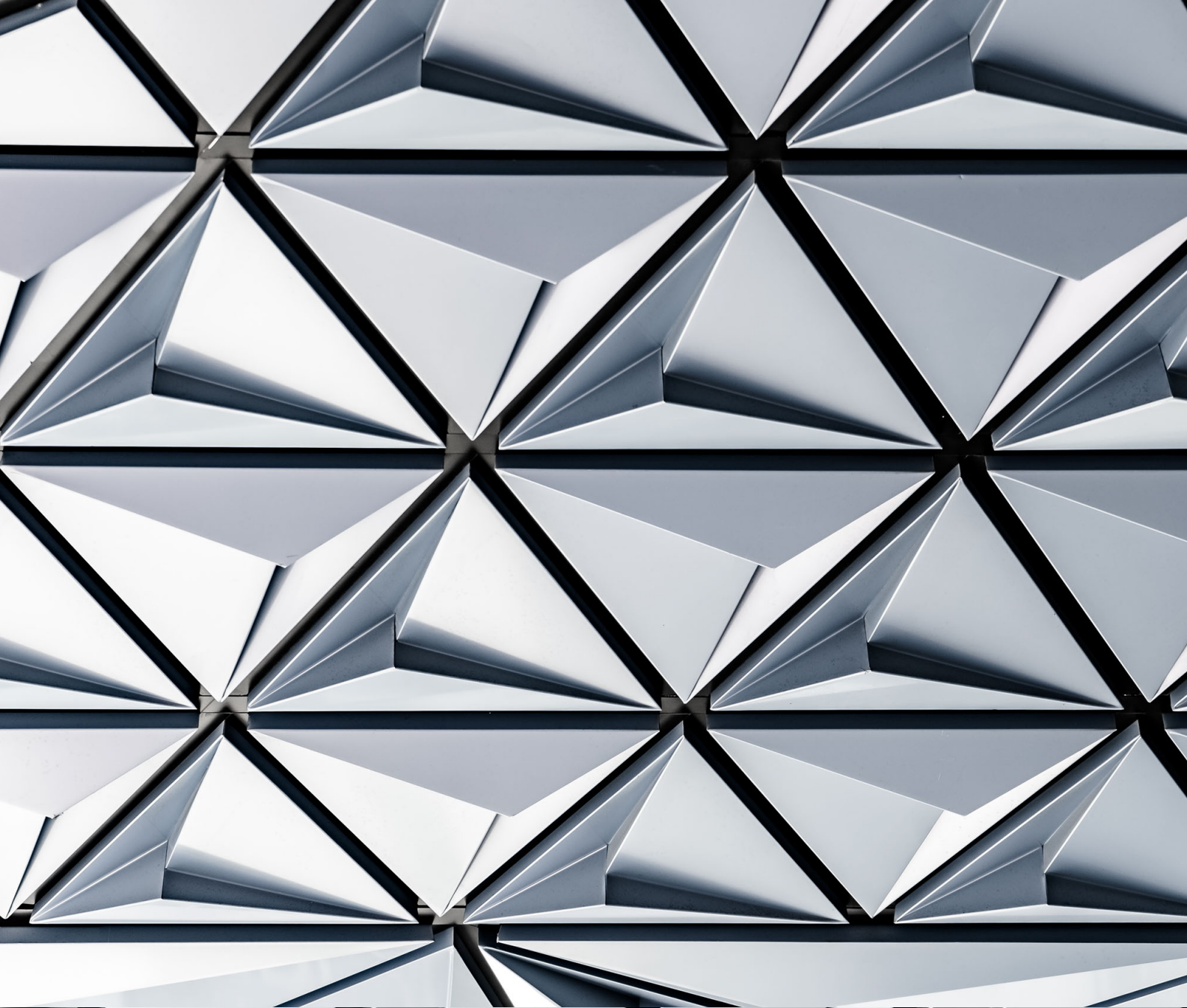
Dr David Robertson, Director, Cumberland Ecology

Cumberland Ecology were recently involved in targeted koala searches at a site in Western Sydney. Our ecologists Jesse, Gitanjali, Matt, and Elise worked alongside ecologist Craig Falkner and his expert conservation detection dog Jet; both from Reconeco.

Conservation detection dogs are trained to search and detect various fauna species such as quolls, koalas, and sometimes also feral animal species.

Therefore, a trained conservation detection dog like Jet can be utilised in threatened species conservation programs as well as feral animal management and control programs.

Cumberland Ecology is proud to support such an important initiative as the usage of conservation detection dogs in ecological work, which is an innovation that will hopefully improve the detection of threatened wildlife and ultimately play an important role in threatened species conservation programs in the future. We look forward to working with Craig and Jet in the future.



COMBUSTIBLE CLADDING

Neil McClelland, Technical Director - Facade, TTW

Deficiencies in the worldwide use of combustible cladding have been evident for the last 20+ years. However, it was not until the Lacrosse fire in Melbourne on 25 November 2014 that deficiencies in Australian construction practices became evident and it was not until the Grenfell fire in London on 14 June 2017 where 72 fatalities occurred that

meaningful action to address safety issues in combustible cladding began in Australia.

Due to its popularity (and flammability), the most problematic form of combustible cladding is Aluminium Composite Panel (ACP). This product typically consists of 0.5mm aluminium inner and outer laminates bonded together by a plastic core typically of 3mm to 5mm thickness. The commonest core material is polyethylene (PE) which is highly combustible, as unfortunately demonstrated in the Lacrosse and Grenfell fires.

Unfortunately, the combustible nature of ACP makes it inappropriate as a cladding material in many applications, and certain types of ACP have never been National Construction Code (NCC) compliant as found in the recent judgement of the Lacrosse fire litigation.

Recent revisions to the NCC and general industry awareness of the issues of combustible cladding have resulted in major changes to external wall material selection and compliance checking, at least on major projects. The chance of non-compliant combustible cladding appearing on these buildings is now greatly reduced.

The major problem with combustible cladding is on existing buildings. Most States have created audit plans for combustible cladding and many of these audits are well advanced with many building owners with 'at risk' combustible cladding having already received (and responded to) audit notices. The first step in this audit process is to engage a suitably qualified person to identify if there are any combustible exterior wall materials on the building, noting that there are several non-ACP cladding materials that are also combustible (eg steel sandwich panels and timber). If combustible cladding is identified, then seek legal advice as to whether your insurer or the building occupants need to be notified.

Where combustible cladding is present, it is recommended to engage a Building Certifier (and possibly Fire Engineer) to carry out a risk assessment which may justify retaining some of the combustible cladding. Note that NSW Fair Trading has introduced a ban on ACP with more than 30% PE which requires removal of that material in several defined applications.

Paying for replacement of non-compliant combustible cladding may be problematic, particularly for older buildings, as there may not be a legal avenue to recover costs.



SIMPLE QUESTIONS TO ASK IF YOUR DESIGN IS COMPLETE, ACCURATE & COORDINATED

Peter Ibrahim, Senior Project Manager, EPM Projects

When the design of a project is underway, it will appear complicated and complex at first glance. Understandably, clients are not experts in design and therefore rely on a design consultant's level of expertise and know-how to safeguard against errors or omissions, not just on behalf of the consultant itself, but also others that it is coordinating with in the consultant team.

This article covers a few simple questions that can prompt the consultants to interrogate their own documentation for completeness, accuracy and coordination before issuing the documentation for construction:

1. Have you considered how I'm going to maintain this project after it's constructed?

Consultants need to consider the operational future of a facility once a client takes ownership. Examples of this include positioning of power and water points for maintenance purposes and how an elevated work platform might reach a light fitting two stories high. By asking your team this question, conscientious decisions around materials and locations for services can make all the difference once a client occupies a building.

2. Have you considered the design of others?

Whilst consultants are experts in their respective fields, they are not expert in the field of others. It's important that some level of interrogation of another expert's design is undertaken in order to gain comfort that the needs of others are satiated. Often this question is best directed to a "Lead Design Consultant" whom is essentially responsible to coordinate all facets of the design.

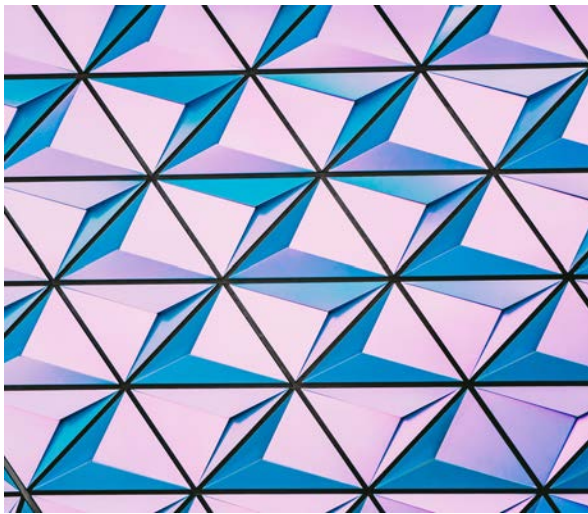
3. Is there an element of the design that you're unfamiliar with?

Whilst this question may evoke a somewhat guarded response from a consultant, it's one that must be asked for the sake of attaining completeness. This might lead to the engagement of a specialist in an area of design such as a substation designer (in addition to the electrical consultant), or a façade consultant (in addition to a structural consultant). By asking this question, the results can be invaluable as a client is afforded an opportunity to cover these gaps.

4. What have you assumed?

Consultants can be inclined to make assumptions on behalf of clients about the design of a project. Some of the assumptions aren't often discovered until after the design is complete. By bringing any assumption to the surface, a client can take the opportunity to interrogate the assumption via some form of investigation. This question can be a powerful tool in de-risking projects.

In summary, if your design is underway, no question is 'silly' as it's often the one that goes unasked that will lead to an outcome having the greatest impact on the project. Bringing any shortfalls to the surface as early in the process as possible will afford the project team an opportunity to safeguard against the consequences if discovered later in the project. And remember a good design brief prepared before design gets underway is an excellent tool to avoid errors and omissions in design along the way.



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